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NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ABRAHAM CARDENAS TOSCANO, Defendant and Appellant.	E029647 (Super.Ct.No. RIF093364) **OPINION**

APPEAL from the Superior Court of Riverside County. Gordon R. Burkhart, Judge. Affirmed as modified.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gary W. Brozio, Supervising Deputy Attorney General, and Kevin R. Vienna, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)[1]). Thereafter, defendant admitted he had

[1] All future statutory references are to the Penal Code unless otherwise stated.

served two prior prison terms within the meaning of section 667.5, subdivision (b). Defendant was sentenced to a total term of four years in state prison: the middle term of three years on the assault count and a consecutive term of one year on the first prison prior. The trial court also imposed but stayed the one-year prison time for the second prior prison term.

On appeal, defendant contends (1) the trial court improperly instructed the jury with CALJIC No. 4.20 (the voluntary intoxication instruction); (2) the trial court improperly instructed that "hands and feet" may be a means of force likely to produce great bodily injury; and (3) the second prior prison term enhancement should have been stricken rather than stayed, and the abstract of judgment erroneously indicates that he was convicted by a court trial. We agree with the parties that the second prior prison term enhancement should have been stricken and the abstract of judgment requires correction, but we reject defendant's remaining contentions.

I

FACTUAL BACKGROUND

On April 9, 2000, at about 6 p.m., Mario Garcia pulled into a Rite-Aid parking lot in Corona with his wife and two young children. As he drove through the parking lot looking for a parking space, his minivan was nearly struck by a black Ford Escort, which was driven by defendant. Garcia turned into a parking space and got out of his car. Defendant also turned into a nearby parking space and exited the car with his passenger.

Upset and angry, Garcia loudly called out to defendant and told him he needed to slow down because he had nearly struck Garcia's car while his children were inside.

Defendant, walking toward Garcia, angrily responded by repeatedly asking, "Did I hit you? Did I hit you?" Defendant approached Garcia close enough for Garcia to smell alcohol on his breath. Defendant's passenger also approached Garcia and stood behind him.

Defendant thereafter swung his closed fist and struck Garcia in the head. Garcia fell to the ground on his hands and knees. When he tried to rise, he was repeatedly kicked and punched by defendant and his passenger in his upper body and head. Garcia estimated that he received more than ten punches and more than ten kicks.

As Garcia again struggled to get to his feet, he was struck on the head with a beer bottle; he felt the bottle break on his head. Garcia did not see who delivered that blow, but he had noticed that defendant's passenger was holding a beer bottle when he first exited the car and that the passenger still had the bottle when he stood behind Garcia. At that point, Garcia curled into a fetal position to protect his head.

Garcia had neither touched defendant nor raised his hands, but, according to a witness at the scene, he may have grabbed defendant's legs when he first went down. The witness, who was parked near Garcia's car and who was waiting inside his car for one of his children to return from Rite-Aid, saw defendant speeding in the parking lot and nearly collide with Garcia's car. He also observed the incident between defendant and Garcia.

When the witness saw Garcia's wife, who was watching the incident, get out of her van and yell for the men to stop, the witness also got out and approached. The witness called out "'that's enough.'" Two other men approached the scene and told defendant and his passenger to stop the attack on Garcia. Defendant and his comrade continued to walk toward the Rite-Aid entrance and were involved in another fight with one of the men who

had come to Garcia's aid. Someone yelled that the police had been called, and defendant and his passenger took off in their car. Garcia stumbled back to his van and called 911; he gave the police defendant's car's license plate number and drove away. He returned when he saw the police arrive.

Garcia's injuries included two swellings on his head, one of which bled and persisted for a week; an inner cut to his lip; a bloody nose; scraped elbows and knees; and contusions to his back. He missed work the next day.

The defense rested without presenting on any evidence.

II

DISCUSSION

A. *Instructing Jury With Voluntary Intoxication Instruction*

Defendant contends the trial court improperly instructed the jury, over defense objection, that voluntary intoxication is not a defense (CALJIC No. 4.20).[2] He claims the instruction lacked an evidentiary basis and was otherwise improper. He further asserts the trial court compounded this error by declining to define the term "voluntary intoxication."

It is well settled that "'in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for

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[2] CALJIC No. 4.20 as given by the court provides: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. In the crime charged or the lesser crime thereto, the fact that the defendant was voluntarily intoxicated, if . . . that in fact is your finding, is not a defense and does not relieve him from responsibility of the crime."

the jury's understanding of the case.'" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 149; see also § 1093, subd. (f).) A trial court also has no sua sponte duty to give amplifying or clarifying instructions where the terms used in the instructions given are commonly understood by those familiar with the English language. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318-1319; *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360.)

In the present matter, the trial court properly instructed the jury with CALJIC No. 4.20. As the record reveals, there was some evidence of alcohol consumption by defendant, but not enough to raise a defense of voluntary intoxication. Thus, as the People note, the instruction was necessary to avoid confusion on the part of the jury as to whether the mentioned alcohol use had any effect on defendant's criminal responsibility. Contrary to defendant's assertions, the challenged instruction was a proper statement of the law as applied to the facts of this case, and it contributed to the jurors' understanding of the law. Moreover, when a defendant is charged with a general intent crime, the giving of CALJIC No. 4.20 is permissible. (*People v. McCoy* (1984) 150 Cal.App.3d 705, 710.) Defendant here was charged with a general intent crime: assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) is a general intent crime. (See *People v. Tran* (1996) 47 Cal.App.4th 253.)[3]

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[3] Defendant also unintelligibly argues that the trial court erred in giving the voluntary intoxication instruction in connection with the aiding and abetting instruction. When a defendant is charged with both general intent crimes and specific intent crimes, the giving of CALJIC No. 4.20 is permissible so long as the instruction is tailored to clearly advise the jury that intoxication is not a defense to the general intent crimes but that intoxication should be considered in connection with the specific intent crimes. (*People v. McCoy, supra*, 150 Cal.App.3d at p. 710.) Even if we were to assume CALJIC No. 4.20

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Furthermore, we disagree with defendant's interpretation of CALJIC No. 4.20 and conclude that the jury could not have given the instruction the interpretation advanced by defendant in view of the other instructions given by the trial court. First, the trial court instructed the jury according to CALJIC No. 1.00 that it was the duty of the jury to determine the facts from "the evidence received in the trial and not from any other source. A 'fact' is something proved by the evidence." In addition, the trial court also gave CALJIC No. 17.30, and thus told the jury, "I have not intended by anything that I have said or done . . . or by any questions that I may have asked or any rulings I may have made to intimate or suggest what you should find to be the facts or that I believe or disbelieve any witness. [¶] If anything I have done seems to so indicate, you shall disregard it and form your own conclusions." Finally, the trial court also instructed the jury according to CALJIC No. 17.31 that "[t]he purpose of the Court's instructions is to provide you with the applicable law so that you can arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude because an instruction is given that I am expressing an opinion regarding any of the facts."

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was erroneously given in connection with the aiding and abetting instruction, we could find no substantial risk of misleading the jury to defendant's prejudice. (*People v. Rollo* (1977) 20 Cal.3d 109, 123; *People v. Robinson* (1999) 72 Cal.App.4th 421, 428-429; *People v. Plaza* (1995) 41 Cal.App.4th 377, 386; *People v. Ballard* (1991) 1 Cal.App.4th 752, 756; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 793; *People v. Hairgrove* (1971) 18 Cal.App.3d 606, 608-609.) As defendant acknowledges, there was no evidence that defendant was intoxicated to a point that would warrant an intoxication defense. Further, based on the evidence in this case, it is not reasonably probable that, even without CALJIC No. 4.20, the jury would have reached a verdict more favorable to defendant. (*People v. Ballard*, *supra*, at pp. 756-757; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

In our view, the foregoing instructions clearly advised the jury of their duty to find the facts based solely on the evidence. We must presume the jury followed those instructions (*People v. Chavez* (1958) 50 Cal.2d 778) and found that defendant committed an assault by means of force likely to produce great bodily injury based on the evidence. Thus, defendant's claim that the instruction can be seen as directing the jury to presume that he was intoxicated is without merit.

In addition, a definition of voluntary intoxication was unnecessary as it would not have assisted the jury. As the trial court concluded, intoxication is a term commonly understood by a jury.

Accordingly, we conclude that the trial court did not err in giving CALJIC No. 4.20.

Even if the trial court erred in giving CALJIC No. 4.20, it was harmless error. (*People v. Watson* (1956) 46 Cal.2d 818.) "An erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury." (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10.) Here, the jury was not likely to be misled by the instruction. As stated above, the court here also instructed the jury with CALJIC Nos. 1.00, 17.30 and 17.31. Defendant's instructional error objection is valid only if we assume the jury did not follow the trial court's other instructions.[4] We cannot engage in such speculation and, in fact, must presume the opposite — a jury properly instructed "will faithfully follow such instructions." (*People v. Collins* (1976) 17 Cal.3d 687, 694, fn. omitted.) Thus, even if

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[4] Defendant incorrectly argues that "[t]he prosecutor was able to argue with instructional support, not only that [defendant] punched [Garcia] . . . but that he was drunk . . . to boot." The prosecutor never argued defendant was drunk or that he had been drinking in his closing arguments to the jury.

erroneous, we conclude that any error committed by the trial court in giving CALJIC No. 4.20 constituted harmless error.

B. *"Hands and Feet" Instruction*

Defendant also contends the trial court failed to adequately instruct the jury regarding the charged crime of assault by means of force likely to produce great bodily injury. He claims the court should have also instructed the jury with a special instruction on the nature and manner of the force used, similar to CALJIC No. 9.08, since the prosecutor's special instruction that "[t]he use of hands or feet may constitute an assault by means of force likely to produce great bodily injury" was insufficient.

At trial, both parties requested the standard instructions on the definition of assault and the elements of aggravated assault — CALJIC Nos. 9.00 and 9.02. As given, CALJIC No. 9.00 states, in relevant part: "To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted, that may be considered in connection with other evidence in determining *what kind of an assault it is*. Well, first of all, whether an assault was committed and *what type of assault it is* or *what the nature of the assault is*." (Italics added.)

CALJIC No. 9.02, as given to the jury, states, in pertinent part: "Great bodily injury refers to significant or substantial injury or damage. It does not refer to trivial or insignificant injury or even moderate harm. [¶] In order to prove this crime, each of the following elements must be proved: . . . (2), The assault was committed him [*sic*] by means of force likely to produce great bodily injury."

The prosecutor also requested an instruction that was referred to as "Special 1." That instruction stated, "the use of hands or feet may constitute assault by means of force likely to produce great bodily injury." Defense counsel did not object but suggested that the special instruction should also state that "use of hands or feet does not constitute use of a deadly weapon . . . ." The trial court declined defense counsel's suggestion and agreed to give the special instruction as requested by the prosecutor.

Neither party requested and the court did not give CALJIC No. 9.08, which provides: "An assault by means of force likely to produce great bodily injury may be committed with the hands or fists. Proof of such an assault need not show that the defendant actually injured the other person. However, there must be proof that the manner of the assault was likely to produce great bodily injury upon another person." (CALJIC No. 9.08 (6th ed. 1996).)

Defendant essentially argues that the trial court erred by failing to sua sponte give a pinpoint instruction along the lines of CALJIC No. 9.08 and that the special instruction, Special 1, was insufficient.

We first note that, when a defendant believes an instruction needs clarification or amplification, it is his burden to indicate such. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192-1193.) Failure to request amplification or clarification of the instruction in the trial court precludes review on appeal. (*Ibid*.) Defendant neither requested CALJIC No. 9.08, nor a modification thereof, nor a further elaboration of the special instruction, nor a pinpoint instruction relating to the

manner or nature of force used. Hence, defendant waived his claim of error. Even so, we reject defendant's claim of error.

In support of his position, defendant relies on *People v. Aguilar* (1997) 16 Cal.4th 1023. In that case, our Supreme Court concluded the use of hands or fists alone may support a conviction for an assault by means of force likely to produce great bodily injury. (*Id*., at p. 1028.) The court also noted that, although the resulting injury is highly probative of the amount of force used by a defendant, it is not conclusive. (*Id*., at p. 1035.)

Furthermore, in that case, as in this, CALJIC No. 9.02 was given, and the Supreme Court found that the instructions "called on the jury to find defendant's conduct had the capability and probability of inflicting great bodily injury under either a 'deadly weapon' theory or a 'force likely' theory. The jury's analytical process was the same in either event." (*People v. Aguilar, supra*, 16 Cal.4th at p. 1037, fn. omitted.) The court also observed that the prosecutor in that case argued that it was the manner in which the hands or feet were used that was significant by stating that, if the manner in which they were used could cause great bodily injury, then they could become deadly weapons. (*Id*., at p. 1036.) Similarly, in this case, the prosecutor argued that it was the manner in which the hands and feet were used that caused great bodily injury. The prosecutor urged the jury to consider the nature of the attack, the specific means of the assault, and whether those means were likely to produce great bodily injury.

As noted above, the instructions given here were the same as those given in *Aguilar*. They properly focused the jury on whether defendant's conduct had the capability and probability of inflicting great bodily injury. As the *Aguilar* court concluded, "[t]he

instructions thus specifically invited the jury to consider the evidence of any blows from fists [and feet] under the correct rubric ('force likely to produce great bodily injury')." (*People v. Aguilar, supra,* 16 Cal.4th at p. 1038.) The same is true here.

Even if the trial court erred in failing give an instruction like CALJIC No. 9.08, it was harmless error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 818.) The jury was properly instructed with CALJIC Nos. 9.00 and 9.02. The prosecutor emphasized the importance of the means, nature, and manner of the assault in his closing arguments to the jury, repeatedly drawing the jurors' attention to the context of the attack, in finding defendant guilty of aggravated assault.

Furthermore, the evidence was overwhelming that defendant committed an assault by means of force likely to produce great bodily injury. Defendant angrily approached the victim and without warning or provocation punched Garcia in the head with a closed fist, knocking Garcia to the ground. Defendant and his companion then repeatedly punched and kicked Garcia in the head and upper body. On this alone, the jury could have found aggravated assault. (*People v. Wingo* (1975) 14 Cal.3d 169, 173 [the use of fists alone is sufficient to support conviction of assault by means of force likely to cause great bodily injury]; *People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066 [same]; *In re Niran W.* (1989) 207 Cal.App.3d 1157, 1161-1162 [a single blow, delivered with great force and without warning, may constitute sufficient force to cause great bodily injury].) Further, as Garcia struggled to get to his feet, defendant's passenger struck Garcia in the head with a beer bottle with sufficient force to break the bottle. (See *People v. Cook* (1998) 61 Cal.App.4th 1364, 1368-1371 [one who is present and actively participates in elements of

charged crime is guilty as perpetrator; no aiding and abetting instruction is required].)[5] Garcia's injuries also indicated defendant assaulted Garcia with sufficient force likely to produce great bodily injury. Contrary to defendant's contentions, this was not a close case between aggravated assault and simple (misdemeanor) assault. Accordingly, there is no reasonable probability that, absent a clarifying instruction on the manner and nature of the assault, the result would have been more favorable to defendant. (*People v. Watson*, *supra*, 46 Cal.2d at p. 818.)

C. *Second Prior Prison Term Enhancement & Correction of Abstract*

Lastly, defendant contends, and the People correctly concede, that the trial court erroneously stayed the imposition of a one-year sentence on the second prior prison term. As both parties point out, the trial court should have stricken rather than stayed the one-year term. (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1231 [while a trial court has the authority to impose or strike an enhancement, it does not have the authority to stay the enhancement].) Accordingly, the second prior prison term should be stricken.

Defendant further correctly claims, and the People agree, that the abstract of judgment mistakenly indicates that defendant was convicted after a court trial rather than a jury trial. The abstract of judgment should therefore be corrected accordingly.

III

DISPOSITION

The judgment is modified by striking the second prior prison term and by correcting the abstract of judgment so as to reflect that defendant was convicted after a jury trial. The

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[5] The trial court, however, provided the jury with proper instructions regarding

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trial court is directed to amend the abstract of judgment so as to reflect these modifications and to forward a certified copy of the amended abstract of judgment to the Department of Corrections. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

GAUT
J.

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liability as an aider and abettor — CALJIC Nos. 3.00 and 3.01.